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No. 82-1150

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HOWARD ELLIS, *et al.*,
Petitioners,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, *et al.*,
Respondents.

ALLEN L. FAILS, *et al.*,
Petitioners,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

The opinions below, the basis of this Court's jurisdiction and the constitutional and statutory provisions involved are set out at pp. 1-2 of the petition for a writ of certiorari ("Pet.") and at p. 36a of the separately bound appendix to the petition ("Pet. App.")

STATEMENT OF THE CASE

This suit by a group of Western Airlines employees challenges their obligation to pay "union dues" in the amount provided for in a collective agreement between their employer and their exclusive bargaining representative—the Brotherhood of Railway, Airline and Steamship Clerks ("BRAC").[1]

On January 21, 1976, the district judge entered an interlocutory summary judgment in favor of the plaintiffs, ruling that under the Railway Labor Act, 45 USC § 151 *et seq.*, the several types of union activity identified in Paragraph 22 of that court's accompanying findings of fact constitute "non-collective bargaining activities" objecting employees need not financially support. (Pet. App. 22a, 24a, 25a-26a.) Paragraph 22 excludes from the dues payment obligation not only the costs attributable to union political activities and ideological activities unrelated to collective bargaining but also normal union operating costs including the entire amount for conventions, journals, litigation, social activities, death benefits and organizing.

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[1] We have placed the term "union dues" in quotation marks because the petitioners in this case include employees who, at the relevant time, were union members and whose challenge concerns the amount of their union dues, and other employees who, at the relevant time, were not union members but because of the union security clause of the collective agreement were paying fees in the same amount as union dues and whose challenge concerns the amount of those fees. For simplicity's sake we use the term "union dues" throughout.

After the ensuing trial, the district court determined that the employees' undisputed right of abstention from supporting union political activities and ideological activities unrelated to collective bargaining is fully protected under the union's internal system. (Pet. App. 31a.) And, that court's judgment requires the reduction each year of petitioners' dues obligation by the ratio of such expenditures to total expenditures in the previous year. (Pet. App. 34a, ¶ 3.)

The court of appeals affirmed the district court's decision and judgment with respect to the union's internal system. (Pet. App. 5a-6a.) The court of appeals, however, reversed the district court's Paragraph 22 ruling, holding that objecting employees are required to bear their share of the union's operating expenditures covered therein. (Pet. App. 9a-14a.)

REASONS FOR DENYING THE WRIT

In this case, the court of appeals was called on to apply the general principles, concerning the limits of the financial obligation that may be imposed under a union security clause permitted by the Railway Labor Act, declared in *Railway Employees' Dept.* v. *Hanson*, 351 U.S. 225, *Machinists* v. *Street*, 367 U.S. 740, *Railway Clerks* v. *Allen*, 373 U.S. 113. The decision below is the initial one by any appellate court particularizing the lessons of *Hanson*, *Street* and *Allen* in order to determine the precise types of union activity that an objecting employee need not support financially. The task of applying the general rules of law articulated by this Court to particular situations is, of course, one that is regularly left to the lower courts. And, in this instance, the court of appeals proceeded in a manner entirely faithful to this Court's rulings.

Moreover, because of the comprehensive coverage of the union's internal system for relieving objecting employees of the obligation to support union political activity and ideological activity unrelated to collective bargaining, and

the prospective relief provided by the district court's judgment, the decision below provides extremely broad protection for the right of such employees to abstain from supporting such activities. Petitioners' assertion that they are required to make payments to the union that may be used for political and ideological activity and only thereafter returned, on which a claimed conflict in the lower courts is predicated, is simply inconsistent with the judgment below. (See p. 7 *infra*.) And the contention that the issues raised by this Railway Labor Act case are of pervasive importance disregards the critical fact that the state court decisions cited (Pet. App. 37a-40a) arise under a variety of *state statutory schemes*, and declare no constitutional principle inconsistent with the decisions below.

In short, there is no conflict in the appellate decisions, or with this Court's decisions, and the petition for a writ of certiorari should be denied.

I. BOTH LOWER COURTS CORRECTLY CONCLUDED THAT IN THE AREA OF UNION POLITICAL AND IDEOLOGICAL EXPENDITURES, PETITIONERS' RIGHTS ARE FULLY VINDICATED UNDER THE UNION'S COMPREHENSIVE INTERNAL SYSTEM.

The limits of the financial obligation that may, consistent with the Railway Labor Act as construed by this Court in *Hanson*, *Street*, and *Allen*, be provided for in a union security clause are succinctly stated in *Abood* v. *Detroit Board of Education*, 431 U.S. 209:

> In *Street* * * * the record contained findings that the union treasury to which all employees were required to contribute had been used "to finance the campaigns of candidates for federal and state offices whom [the plaintiffs] opposed, and to promote the propagation of political and economic doctrines, concepts and ideologies with which [they] disagreed." 367 U.S., at 744.

The Court recognized, *id.*, at 749, that these findings presented constitutional "questions of the utmost gravity" not decided in *Hanson*, and therefore considered whether the Act could fairly be construed to avoid these constitutional issues. 367 U.S., at 749-750. The Court concluded that the Act could be so construed, since only expenditures related to the union's functions in negotiating and administering grievances and disputes fell within "the reasons . . . accepted by Congress why authority to make union-shop agreements was justified," *id.*, at 768. The Court ruled, therefore, that the use of compulsory union dues for political purposes violated the Act itself. Nonetheless, it found that an injunction against enforcement of the union-shop agreement as such was impermissible under *Hanson*, and remanded the case to the Supreme Court of Georgia so that a more limited remedy could be devised.

* * * *

* * * To be required to help finance the union as a collective-bargaining agent might well be thought * * * to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. "The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy. If that were allowed, we would be reversing the *Hanson* case, *sub silentio*." *Machinists* v. *Street*, 367 U.S., at 778 (Douglas, J., concurring). [431 U.S. at 219-220, 222-223.]

The courts below were clearly correct in concluding that the union's internal system at issue here satisfies this

Court's directive that objecting employees covered by a union security clause not be required to support union political activity and ideological activity unrelated to collective bargaining.

In adopting the internal system, BRAC's Executive Council sought to "provide the broadest possible respect for personal choices in the area of politics and ideology," including "every level and kind of union expenditure and disbursement" and "fair internal union procedure and remedy for the employee who believes the rebate offered him is inadequate" (CR 291 Ex. CA; see also Ex. CE, CF).[2] Consistent with its purpose of providing "the very best rebate program, the most liberal of any union" (RT 934; see also RT 910, 934-36, 951-53), BRAC's plan includes every category of political, legislative and lobbying expenditure, as well as all other ideological expenditures and all dues and contributions to other labor federations, organizations or charities, of whatever kind (CR 291 Ex. CA).[3]

On the basis of extensive trial testimony and exhibits the district court, in findings and conclusions affirmed by the court of appeals, ruled that petitioners' right to refrain from financial support of union political activity and ideological activity unrelated to collective bargaining is fully protected:

> 4. On October 6, 1975, BRAC adopted a rebate plan encompassing all political and legislative expenditures

[2] "CR" citations refer to the docket entries and exhibits in the district court; "RT" citations refer to the trial transcript.

[3] Indeed, the system covers expenditures that under the decided cases probably need not be included, and that the BRAC Executive Council believed were direct collective bargaining disbursements (RT 910, 933-34, 951-52, CR 291 Ex. CA, CE). For example, although this Court's decision in *Abood* identifies as non-chargeable only ideological activities "unrelated to collective bargaining" (431 U.S. at 236), BRAC's system includes *all* expenditures for legislative and regulatory agency activity, no matter how intimately related to collective bargaining.

of the Grand Lodge and subordinate units, as well as all ideological expenditures and all dues and contributions to other labor federations, organizations and charities. That plan is a good-faith effort to comply with the requirements imposed by the United States Supreme Court in *International Association of Machinists* v. *Street*, 367 U.S. 740 (1961), and *Brotherhood of Railway and Steamship Clerks* v. *Allen*, 373 U.S. 113 (1963). The Grand Lodge Board of Trustees annually computes political-ideological rebates due to any protesting dues payer for the prior calendar year. These are computed on the basis of forms submitted by subordinate units and upon reports of political time and expenditures by Grand Lodge personnel which are contemporaneously logged on the Grand Lodge computer system throughout the calendar year. Any employee who believes his rebate inadequate may appeal directly to an independent Public Review Board authorized to make final determinations on such appeals. Members of the Board include former Governor Edmund G. Brown, Dame Soia Mentschikoff and Reverend Preston Bradley.

The Board of Trustees' computation for calendar year 1975 disclosed that 4.68% of the Union's total income from dues and fees had been expended for items included in the rebate plan, and each plaintiff in this suit was sent a refund check for that proportion of his 1975 dues payment, as well as for each earlier year back to the date of his initial dues protest. The rebate computation for 1976 was 4.9%, and each plaintiff was then sent that amount for 1976 plus the amount necessary to increase to 4.9% the rebate for each prior year since his protest. Plaintiffs have also been sent their rebates for 1977, amounting to 5.4% of their dues payments in that year. No plaintiff has appealed to the Public Review Board, although each has been advised of his right of appeal.

5. On the basis of the above finding, the Court concludes that plaintiffs' rights in the political-ideological

> area have been vindicated by the rebates they have received and are protected for the future by the rebate plan [Pet. App. 30a-31a].

Moreover, the union's internal system is supplemented by the district court's judgment which *"reduces the dues payment obligation of any plaintiff for each calendar year" by the "preceding calendar year['s]" ratio of union political and ideological expenditures to total union expenditures.* (Pet. App. 34a; emphasis added.) Thus, the system approved by the district court, embodied in its judgment, and affirmed in this respect by the court of appeals, does not, as the petition claims, "allow[] for the collection and expenditure of compulsory dues and fees for purposes and activities which BRAC recognizes as being beyond those which can be lawfully charged to protesting employees of Western Airlines." (Pet. 20.) Rather, the district court's judgment tracks this Court's suggestion in *Allen*, 373 U.S. at 122, of a "practical decree," by providing both for a "refund" from dues already paid and for a "reduction of future [dues]." The question whether a straightforward rebate system is, as petitioners contend, legally inadequate is academic in this case.[4]

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[4] None of the cases cited in the petition (at pp. 22-25) provide more protection for objecting employees than the judgment here provides or otherwise support the claim made in the petition of a lower court conflict warranting this Court's review. Of the two state court decisions only *School Comm. of Greenfield v. Greenfield Education Ass'n*, 385 Mass. 70, 431 N.E.2d 180, is by the state's highest court. And *Greenfield* concerned the financial obligations that may be imposed on objecting employees *prior* to a determination of the amount such an employee is obligated to pay and does not even address the situation presented here which concerns the type of order that may be entered *after* such a determination. With regard to the other three cases cited in the petition, it suffices to say that one is an interlocutory decision by a state intermediate appellate court and two are interlocutory decisions by federal district courts. Such decisions, of course, do not—even if they supported petitioner's position that the judgment here is inadequate (which they do not)—create the type of conflict this Court sits to resolve.

II. THE COURT OF APPEALS' APPLICATION OF THE CORRECT LEGAL STANDARD TO THE PARTICULAR FACTS OF THIS CASE PRESENTS NO ISSUE WARRANTING REVIEW.

(a) The court of appeals noted that the objecting employees

> argue that they cannot be charged for certain major operating expenditures of the union * * *. Expenditures for these activities are not "political" or "ideological" and thus not governed by the narrow holdings of *Street* and *Abood*. Nonetheless, appellants interpret language in those and other opinions as indicating that such expenditures are not part of the collective bargaining and grievance administration costs to which objecting employees can be required to contribute. [Pet. App. 3a, 4a.]

That court, while recognizing that this Court has not yet "delineat[ed] the boundaries of acceptable mandatory dues provisions," carefully reviewed this Court's *Hanson*, *Street*, *Allen* and *Abood* decisions for guidance and on the basis of that review concluded:

> Language in other Supreme Court decisions supports a broader concept of collective bargaining [than that urged by the objecting employees]. *Allen* refers to the oblegation to support "activities *germane* to collective bargaining," 373 U.S. at 122, 83 S.Ct. at 1163 (emphasis added); *Abood* cited that language with approval, 431 U.S. at 239 n.40, 97 S.Ct. at 1802 n.40. *Hanson* noted that an employee has the duty to support the "work of the union *in the realm* of collective bargaining." 351 U.S. at 235, 76 S.Ct. at 719 (emphasis added). *Hanson* also acknowledged that Congress has the power "to require . . . the beneficiaries of trade unionism to contribute to its costs," *id.*, and specifically upheld "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work." *Id.* at 238, 76 S.Ct. at 721. These words support a broader definition of the collective bargaining concept than that urged by appellants. * * *

> * * * Based on our reading of *Hanson*, *Allen*, and *Abood*, however, we believe that the relevant inquiry is whether a particular challenged expenditure is germane to the union's work in the realm of collective bargaining. This formulation respects and protects dissenters' rights, but does not needlessly weaken the union, whose viability is necessary to secure and maintain industrial peace. [Pet. App. 10a]

Petitioners make no showing that the court of appeals' conclusion is unfaithful to the Railway Labor Act as construed by this Court.

(b) The court below not only followed the correct legal standard but properly applied that standard—as we now briefly show, adhering to the sequence that court followed in discussing the challenged expenditures.

(i) In concluding that the union's quadrennial national convention is part and parcel of the union's performance of its bargaining role (Pet. App. 11a), the court below followed *Street's* lead. For this Court noted there that the RLA's legislative history shows an intent to have union shop fees "cover convention expenses." (367 U.S. at 766.)[5]

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[5] As Prof. Lloyd Ulman, an eminent labor economist who directs the Institute of Industrial Relations, University of California, stated: "National unions tend to be large, pluralistic organizations in which substantive differences in economic priorities have to be hammered out among the members * * *. Union elections and conventions provide a means for arriving at a consensus of all of the myriad issues which affect local and national bargaining strategies" (CR 155 Ex. U, at 10).

The accuracy of that statement is demonstrated by BRAC's last convention held prior to the trial below, most of which was devoted to reports, debates and voting on contract bargaining, grievance handling, and employee wage and benefit issues. One of the first events of the convention was a report on national negotiations, including progress on wages, retirement benefits, the health and welfare plan, cost of living increases, job stabilization and grievance handling (CR 155 Ex. S, at 14-19). The convention spent hours on employee retirement problems (e.g., *id.* at 149-58); interest on back pay due as a result of national wage contract or agreement violations (160-61); stabilization of employment, longevity pay, shift differ-

(ii) Recognizing the close connection of union litigation to the performance of the union's bargaining functions, the court below properly concluded that there is no basis for giving employees "a free ride as to these non-political expenses which are related to the union's work as the collective bargaining agent" (Pet. App. 12a).[6]

(iii) The costs of the union's publications, particularly its monthly journal, "The Railway Clerk/Interchange," which is the only direct communications link with the 200,000 employees the national union represents, is also related to its representation functions. Not only is the journal the place for reporting such significant events as the initiation and outcome of negotiations, but it is also the means of educating employees on collective bargaining developments and issues and of distributing ballots on negotiation priorities and strikes.[7]

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entials, holiday pay; sick leave, bereavement pay, retention of seniority, and strike ballots (161-169, 246-258); employee passes on buses, railroads and airlines, as well as birthday-holidays and flexitime arrangements (350-376); employer mutual aid pacts, protection for employees in airline mergers, cost of living increases in retirement benefits (321-335); strikes (319-321); and ratification of nationally negotiated bargaining agreements (399-405).

The court below properly concluded that such convention deliberations "guide the union's approach to collective bargaining and are directly related to its effectiveness in negotiating labor agreements" (Pet. App. 11a).

[6] A trial exhibit listing all of the union's ongoing litigation showed a number involving direct issues over contract interpretation. Another major group of cases involved employee claims that the union (or the union and the employer) violated the duty of fair representation or Title VII of the 1964 Civil Rights Act, in restricting the complaining employees' working rights. The remaining cases involved actions by the union to protect employee interests, including suits challenging the Mutual Aid Pact in the airline industry, to protect employees in carrier bankruptcy proceedings, and to impose trusteeships on subordinate bodies to assure observance of the governing rules.

[7] Journals in the record include explanations of specific contract demands in national negotiations (e.g., CR 155 Ex. K, p. 4; Ex. N, p. 2); announcement of deadlock in negotiations and appointment

(iv) A final area of expenditures the court below found germane to collective bargaining is the union's effort to extend organization among the employees of additional employers, on the principle that "[m]aximum organization of an industry benefits employees and units already organized" (Pet. App. 13a). This Court has repeatedly recognized that reality. *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, holds that the antitrust laws do not prohibit union activities that result in "elimination of price competition based on differences in labor standards," precisely because a union "to be effective * * * must eliminate the competition from non-union made goods." (*Id.*, at 503.) See also *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209 ("employees must make their combination extend beyond one shop"); *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 575, n.24 (unions "have a legitimate and substantial interest in continuing organization efforts after recognition").[8] Like the other areas

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of a federal mediator (CR 155 Ex M, pp. 2, 6); news of a strike ballot and an explanation of issues involved in the potential strike (CR 155 Ex. N, pp. 2,4); announcement of the outcome of a strike vote and appointment of a Presidential factfinding board (CR 155 Ex. O, pp. 2, 4); and successful conclusion of negotiations (CR 155, Ex. Q, pp. 4-5). Significant events for individual system boards and locals are also reported, particularly newly negotiated contracts and their major terms; for example, pacts with Western Airlines (CR 155 Ex. Q, pp. 8-9), Northwest Airlines (CR 155 Ex. O, pp. 10-11), the Dreyfus Corporation (CR 155 Ex. P, p. 7) and Western Pacific Transport (CR 155 Ex. L, p. 11). To make the publication readable, about a third of its total content includes news on general economic matters, historical notes, consumer advice, and similar items intended to make the magazine appealing to its employee audience. The court below properly found that such matter "does not detract from the publication's value in the collective bargaining process" as the "effective means of communication" between the union and the employees the union represents (Pet. App. 12a).

[8] As Prof. Ulman explained "Dues expenditures on organization also play a central role in the collective bargaining process. * * * If some employers within the relevant market are unorganized, they may pay substantially lower wages, be subject to fewer restrictions on the use of labor, and have substantially lower labor costs. That

of union operating costs sustained by the court below as germane to collective bargaining, organizing, then, advances successful collective bargaining for employees already organized.[9]

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competitive advantage * * * would inevitably be reflected at the bargaining table in reduced ability to pay wages and other benefits * * *." (CR 155 Ex. U, at 11-12).

Incomplete unionization may imperil not just the pay and benefits of organized workers but their very jobs as illustrated by the in-flight service operations of the Marriott Corp. (CR 155 Ex. G, at 5). Marriott's operations compete in the same product and labor markets as those of Northwest Airlines, and the wage differential between organized Northwest employees and unorganized Marriott employees worked to the detriment of the former when Northwest was able to buy inflight services from Marriott for less than it could provide them with its own employees. The result was loss of work for Northwest employees represented by BRAC; to avoid further loss of work, BRAC endeavored to organize the Marriott employees.

[9] The court of appeals also rejected the objecting employees' challenges to paying for the union's social activities for its employees and for the union's death benefits program. We treat with these two challenges, each of which concerns relatively small sums of money, in this footnote.

The union's social activities, similar to those that organizations generally provide for the benefit of their staff and officers—occasional banquets, staff retirement luncheons, Christmas parties and the like—are the ordinary amenities to the union's employees commonly provided by all employers to promote staff solidarity and harmonious working relationships, and are allowable business expenses for internal revenue purposes (see CR 155, at 70-72). The Union could hardly be called profligate when, as the court below emphasizes, total social costs amount to less than one percent of its expenditures (Pet. App. 13a).

The national union's death benefits program, which includes all employees, reflects a function that many unions have performed from their earliest days, when employers failed to provide basic protections for workers, and it substitutes for similar collectively bargained benefits. As noted by one authority, "Unions in this country originated as a means of providing mutual aid and protection to their members in the form of low-cost life insurance, pensions, burial grants, and assistance to widows and orphans, as well as to bargain collectively with employers, for higher wages and better

(c) Petitioners, moreover, make no showing that the challenged areas of union expenditure are not germane to collective bargaining (Pet. 9-16). They say nothing whatever about litigation, and only that the court below gave a "whimsical description of social activities" (Pet. 15, n.15). As far as death benefits are concerned, their complaint appears to be the stale claim of exclusion from participation (Pet. 14)—a claim put to rest by a 1975 directive by BRAC President Dennis, disseminated to all dues payers, providing full equality of participation in all BRAC's economic benefits and programs (CR 291 Ex. CB). Petitioners do assert that conventions, publications and organizing are "imbued with an overwhelmingly, ideological essence" (Pet. 14), but they give no basis for suggesting that organizing is ideological and their reference to the "overwhelmingly political focus of union publications and convention activities" is as shown above (pp. 9-11) contrary to fact.

III. PETITIONERS' "STANDARD OF PROOF" ISSUE IS INCONSEQUENTIAL ON THIS RECORD, AND IS WITHOUT FOUNDATION IN THE PRECEDENT ON WHICH THEY RELY.

Petitioners contend that the lower courts erred in accepting "the preponderance of the evidence standard as the appropriate allocation of the burden of proof" (Pet. 17); according to petitioners the defendants should have

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working conditions," J. Mitchell, *Organized Labor* 104 (1903). It is also clear that death benefit plans would be damaged if objecting employees could opt out of participation. This was graphically demonstrated in the early days of insurance with the collapse of insurers that followed a method of risk sharing known as "Assessment Insurance," see T. O'Donnell, *History of Life Insurance In Its Formative Years* (1936). This Court itself has recently declined to permit religious dissenters to remain outside of a federal retirement system because "[w]idespread individual voluntary coverage * * * would undermine the soundness" of the general benefits program, *United States* v. *Lee*, 455 U.S. 252, 258.

been required to "show by clear and convincing evidence from records maintained in accordance with generally accepted accounting principles the amounts spent from those dues and fees for contract negotiation and administration and grievance adjustment" (Pet. i). Review of this issue is likewise entirely unwarranted.

In their zeal to have this Court grant review of the judgment below, petitioners overlook their own concession in the trial court that the standard of proof is inconsequential on this record. On the last day of testimony at the trial the court asked petitioners' counsel, "[A]re you claiming that any substantial political expenditure, straight political expenditure, has not now been refunded?" and Mr. Merrill conceded, "I have no basis to make that claim, your Honor" (RT 1103).[10]

Petitioners' proposed "clear and convincing evidence" standard is also without legal substance. It is mistakenly contended that the decision below is inconsistent with *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (Pet. 18-19). But *Gertz* assuredly did not decide that "because [an] allegedly defamatory statement is directed at a private individual, First Amendment standards are not applicable." (Pet. 19). In *Gertz*, the Court, disagreeing with the plurality in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, ruled that private individuals suing for defamation need not establish by clear and convincing evidence that the defamatory statement was made with knowledge of its falsity or in reckless disregard for the truth, the bur-

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[10] Moreover, the petitioners' contention that BRAC's records "were not maintained in accordance with generally accepted accounting principles" (Pet. 17, see also Pet. 19) is wholly without foundation. The district court accepted BRAC's accounting procedures (Pet. App. 30a-31a, ¶ 4), and its order for determining "the annual reduction amount" accepts, too, the "regular accounting records of the Grand Lodge [of BRAC] which are subject to independent annual auditing" and also requires that official and staff time records "be kept on the basis of a time study or other investigation establishing generally accepted accounting standards * * *." (Pet. App. 31a, ¶ 10).

den imposed on public officials and public figures in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, and reaffirmed in *Gertz*, 418 U.S. at 342. But the *Gertz* Court did *not*, as petitioners argue, hold the First Amendment inapplicable to defamation suits by private individuals. To the contrary the Court relied on the First Amendment in precluding liability without fault and in circumscribing the damage remedy in such suits (418 U.S. at 347-350). In so holding, the Court explained:

> We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. [418 U.S. at 349]

Accordingly, *Gertz* itself squarely refutes petitioners' contention that the preponderance-of-the-evidence standard is inapplicable in any case in which one party's First Amendment interests are at stake (Pet. 17-19). It is petitioners and not the court below, as the petition claims (Pet. 18-19), who have misread *Gertz*.[11]

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[11] Petitioners' contention that they are entitled to have their claim decided on a "clear and convincing evidence" standard is insubstantial for two additional reasons. First, petitioners cite no decision of this Court (and we are aware of none) in which this burden has been imposed on a *defendant*, who ordinarily would be entitled to prevail unless the plaintiff establishes his claim by at least a preponderance of the evidence. More fundamentally, in defamation suits by public officials and public figures against the press, there is a First Amendment interest on only one side—that of the defendant. In actions to determine what proportion of compulsory union dues are reimbursable, there are First Amendment interests on both sides. Petitioners simply ignore the countervailing First Amendment rights of the non-objecting members of defendant unions, although these interests have been recognized by this Court from *Street*, 367 U.S. at 772-773 through *Abood*, 431 U.S. at 238.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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